

Educated in the Classroom or on the Streets: The Fate of Illegal Immigrant Children in the United States

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The proposed Gallegly Amendment, which was introduced in Congress as a part of the 1996 spending bill, would have allowed states to deny a free public education to the children of illegal immigrants. Supporters of this Amendment claimed that its purpose was to decrease the influx of illegal immigrants into the United States and to curb the societal costs of illegal immigration. Based on the Supreme Court's decision in Plyler v. Doe, this Note contends that the Gallegly Amendment is unconstitutional. In addition, this Note argues that the Amendment will not decrease the number of illegal immigrants entering the country, nor will it improve the economy. Instead, this Note asserts that the Gallegly Amendment will only harm society by creating a new class of uneducated people living in the United States.

I. INTRODUCTION

*Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-lost to me,
I lift my lamp beside the golden door!*¹

The preceding quotation is inscribed in the Statue of Liberty: a symbol welcoming newcomers onto American soil.² The presence of an immigrant population within American borders was not a concern in the early years of the

* This Note is dedicated to my family—I am forever grateful for your love, kindness, and unquestioning support. In addition, I would like to extend a special thank you to an immigrant who has truly realized the American Dream: my grandfather, Lawrence Piazza. He has set an example for all who know him and has taught me to live life to its fullest. I would like to thank him for being my inspiration.

¹ Emma Lazarus, *The New Colossus*, Inscription on the Statue of Liberty, dedicated Oct. 28, 1886.

² See Charles Levendosky, *Politics Deport Heart of America: Mean-Spirited Immigration Bill Embraces Many Alien Concepts*, DAYTON DAILY NEWS, Oct. 3, 1996, at 11A.

The exact number of illegal immigrants entering the United States today is unknown. See EDWIN HARWOOD, IN LIBERTY'S SHADOW 1 (1986); MILTON D. MORRIS, IMMIGRATION—THE BELEAGUERED BUREAUCRACY 51 (1985); Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*, 44 U. PITT. L. REV. 409, 409 (1983).

United States.³ At its inception, this nation was comprised of immigrants entering the United States in search of the American Dream: a better life for themselves and their families.⁴ Yet at different times throughout U.S. history,⁵ immigration has become a "lightening rod" for the frustrations of society.⁶ Today, many Americans blame the immigrant population for flooding the job market,⁷ increasing the crime rate,⁸ and overconsuming public resources.⁹ Several commentators believe that partisan politics,¹⁰ racial differences,¹¹ and

³ See STEPHEN H. LEGOMSKY, *IMMIGRATION LAW AND POLICY* 108 (1992). See also George Will, *Illegal Immigrants Should Be a Local Concern*, PRESS-CITIZEN, Nov. 1, 1994, at A11 (explaining that early in this nation's history it had open borders).

⁴ See Lora L. Grandrath, Note, *Illegal Immigrants and Public Education: Is There a Right to the 3 Rs?*, 30 VAL. U. L. REV. 749, 754 (1996).

⁵ Racial issues and a weak economy tend to instigate anti-immigrant epochs. Citizens in the late 1880s asserted that the Chinese immigrants' refusal to assimilate was the cause of various social problems. They also believed that Chinese immigrants flooded the job market and left Americans without job opportunities. Similar anti-immigrant sentiments occurred toward Mexican immigrants in the United States during the Great Depression. See generally ABRAHAM HOFFMAN, *UNWANTED MEXICAN AMERICANS IN THE GREAT DEPRESSION* (1974) (analyzing the anti-immigrant sentiments toward Mexican immigrants in the United States during the Great Depression); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 79-131 (1989) (analyzing anti-immigrant sentiments targeted at Chinese immigrants in the United States).

⁶ See Kevin R. Johnson, *Fear of an "Alien Nation": Race, Immigration, and Immigrants*, STAN. L. & POL'Y REV. 111 (1996) (explaining that because illegal immigrants are a politically weak group, they are "convenient" and "tangible" targets for blame). See also *Don't Bless the Child*, THE PROGRESSIVE, May 1996, at 9 ("There's a cheap and sleazy effort under way to pin our economic woes on immigrants . . . [they] make an easy target."); Arthur Jones, *Californians Attempt to Seal Their Borders*, NAT'L CATH. REP., Oct. 21, 1994, at 3 ("Politicians began worrying, and 'someone had the brilliant idea to blame everything on the immigrants.'").

⁷ See Lawrence Auster et. al., *Them vs. Unz: Special Letters Section*, POL'Y REV., Winter 1995, at 88-89 (asserting that the influx of immigrants disproportionately affects the low-skilled segment of the labor market where job opportunity is shrinking at a rate faster than the supply of low-skilled job seekers).

⁸ See, e.g., David Adams, *Immigration Debate Lacks Facts*, ST. PETERSBURG TIMES, Feb. 11, 1996, at 8A (noting that those favoring tighter immigration restrictions cite the burden that illegal immigrants place on police costs).

⁹ See FEDERATION FOR IMMIGRATION REFORM, *IMMIGRATION 2000: THE CENTURY OF THE NEW AMERICAN SWEATSHOP* 1 (1992).

¹⁰ For a detailed analysis of the political influence underlying the recent immigration debate, see discussion *infra* Part IV.

¹¹ See Johnson, *supra* note 6, at 112-18. The issue of race is an important component in the development of the immigration debate. Although difficult to prove, many commentators feel that facially neutral goals with respect to immigration in today's society are a means of

language barriers¹² exacerbate these anti-immigrant sentiments.¹³

Today, United States immigration policy denies illegal immigrants¹⁴ virtually every social welfare benefit¹⁵ that it provides to citizens.¹⁶ Some examples of these social welfare benefits include food stamps,¹⁷ Supplemental

achieving underlying discriminatory objectives. Seemingly neutral interests such as economics, law enforcement concerns, or general social welfare concerns, for example, may conceal hidden discriminatory agendas. Despite discriminatory undertones to initiative campaigns, it is extremely difficult to prove that legislation seeking to deny illegal immigrant children an education is motivated by a discriminatory intent. *See id.* at 113; *see also* Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650-72 (1995).

For critical analyses of racial attitudes and ethnic identities in the context of second generation immigrants, see generally Rubén G. Rumbaut, *The Crucible Within: Ethnic Identity, Self-Esteem, and Segmented Assimilation Among Children of Immigrants*, 28 INT'L MIGRATION REV. 748, 748-93 (1994) (analyzing ethnic identities, social relationships, and psychological well-being of second generation immigrants); Mary C. Waters, *Ethnic and Racial Identities of Second Generation Black Immigrants in New York City*, 28 INT'L MIGRATION REV. 795, 795-819 (1994) (containing an intensive observational study and survey of West Indian Black Immigrants in New York City).

¹² For an analysis of language adjustment and immigrant children, see generally Alejandro Portes & Richard Schaufli, *Language and the Second Generation: Bilingualism Yesterday and Today*, 28 INT'L MIGRATION REV. 640, 640-61 (1994) (examining linguistic adaptation and the extent and determinants of bilingualism among immigrant children).

¹³ *See generally* Thomas J. Espenshade & Charles A. Calhoun, *An Analysis of Public Opinion Toward Undocumented Immigration*, 12 POPULATION RES. & POL'Y REV. 189, 191-92 (1993) ("Illegal immigrants are convenient scapegoats for a wide variety of societal ills. Politicians wonder whether undocumented migrants will perpetuate their 'private cultures' thereby threatening mainstream American culture.").

¹⁴ It is important to note that illegal immigration data is often flawed and inconsistent. This inconsistency is due to the very nature of illegal immigration: illegal immigrants do not inform the government of their illegal status. Accordingly, existing data is often comprised of "self-serving" and "misleading guesses." *See* MORRIS, *supra* note 2, at 10.

Contributing to the flawed and inconsistent data is the fact that various synonyms exist for the word "illegal," such as "undocumented" and "unsanctioned." The same is true of the word "immigrants," which is used synonymously with "aliens" and "workers." For an explanation of the different terms and their uses, see HARWOOD, *supra* note 2, at 1-24.

¹⁵ Most illegal immigrants do not even apply for the benefits for which they are eligible because they fear detection from the Immigration and Naturalization Service (INS). *See* Adams, *supra* note 8, at 8A (explaining that "[i]t's not as easy to milk the system as some fear").

¹⁶ *See* Hull, *supra* note 2, at 410.

¹⁷ *See* 7 U.S.C. § 2015(f) (1994); *see also* Plyler v. Doe, 457 U.S. 202, 251 (1982) (Burger, C.J., dissenting); DAVID WEISSBRODT, IMMIGRATION LAW AND PROCEDURE

Security Income,¹⁸ Aid to Families with Dependent Children,¹⁹ and Medicaid.²⁰ Nonetheless, many U.S. citizens continue to view immigrants as a drain on society and blame illegal immigrants for everything from the rising crime rate to the declining quality of life in this country.²¹ Citizens should not blame the immigrants themselves, as it is the United States which facilitates the influx of illegal immigrants by maintaining a "half-open door policy."²² In delegating the enforcement of federal immigration laws to the Immigration and Naturalization Service (INS),²³ an underfunded²⁴ and understaffed²⁵ agency,

315-17 (2d ed. 1989); Janet M. Calvo, *Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs*, 16 N.Y.U. REV. L. & SOC. CHANGE 395, 407 (1987-1988); Grandrath, *supra* note 4, at 752.

¹⁸ See 42 U.S.C. §§ 1381-1383 (1994); see also *Plyler*, 457 U.S. at 251 (Burger, C.J., dissenting); WEISSBRODT, *supra* note 17, at 315-17; Calvo, *supra* note 17, at 402, 416-18; Grandrath, *supra* note 4, at 752-53.

¹⁹ 42 U.S.C. §§ 610-615 (1994); see also *Plyler*, 457 U.S. at 251 (Burger, C.J., dissenting); WEISSBRODT, *supra* note 17, at 315-17; Calvo, *supra* note 17, at 402, 419-20; Grandrath, *supra* note 4, at 752-53.

²⁰ See 42 U.S.C. §§ 1396-1396v (1994); see also *Plyler*, 457 U.S. at 251 (Burger, C.J., dissenting); WEISSBRODT, *supra* note 17, at 315-17; Calvo, *supra* note 17, at 402, 418-20; Grandrath, *supra* note 4, at 752-53.

²¹ For a recent study on public opinion toward illegal immigrants, see Espenshade & Calhoun, *supra* note 13, at 189. The results of the study suggested that educational, racial, or nativity variables influence the outcome of perceptions based on particular issues, such as economics. Moreover, the study demonstrated that citizens concerned about the employment of illegal immigrants depleting jobs from the job pool are not more likely to report that illegal immigration is a problem. Rather, the study found that if individuals place more importance on non-job-related issues, they are more likely to report that illegal immigration is a serious problem. For example, individuals who believe that illegal immigrants have a greater likelihood of welfare dependence increasingly report that illegal immigration is a problem. Ethnic tensions, language barriers, and the crime rate are examples of other non-job-related issues that are a dominant concern underlying negative attitudes toward illegal immigration. *Id.* at 203.

²² See Hull, *supra* note 2, at 410. The failure of the INS to properly regulate immigration resulted in the government's creation of what the Select Commission on Immigration and Refugee Policy calls a "half open-door policy." This phrase refers to the paradox created by the U.S. official policy prohibiting illegal immigration accompanied by the tacit approval of illegal immigrants through lax enforcement of illegal immigration laws. See *id.* at n.7 (citing SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, FINAL REPORT AND RECOMMENDATIONS 35 (1981)).

²³ See 8 U.S.C. § 1551 (1994); see also WEISSBRODT, *supra* note 17, at 61; Hull, *supra* note 2, at 410; Grandrath, *supra* note 4, at 760.

²⁴ See Grandrath, *supra* note 4, at 760-61.

²⁵ See *id.*

the United States has made it extremely difficult to enforce immigration laws.²⁶ At the same time, this nation has reaped the benefits that immigration has had on the American economy over the past three decades.²⁷

In recent years, the education of illegal immigrant children has become a focal point of the immigration debate.²⁸ In 1982, the Supreme Court decided *Plyler v. Doe*,²⁹ in which the Court held that states are required to provide illegal immigrant children with a free public education.³⁰ Fifteen years after this decision and in light of changed circumstances,³¹ however, one questions whether *Plyler* is still good law.³² Critics of *Plyler* argue that the case is no longer viable because the illegal immigrant students of today are causing public school systems to go bankrupt,³³ are stretching public resources beyond the limit,³⁴ and are denigrating the quality of public education that students receive.³⁵

The debate over educating the children of illegal immigrants recently came to a head in the context of the proposed Gallegly Amendment,³⁶ which would

²⁶ See Hull, *supra* note 2, at 410 (stating that the INS is "so ill-equipped and underfinanced that it serves more as an irritant than as an impediment for any would-be entrant").

²⁷ See Ron K. Unz, *Immigration or the Welfare State: Which is Our Real Enemy?*, POL'Y REV., Fall 1994, at 33 (citing the net positive gain on the economy that immigrants have had over the past three decades). For an analysis of the economic consequences of illegal immigration today, see discussion *infra* Part III.B.

²⁸ See generally Hull, *supra* note 2, at 409 (analyzing the Supreme Court's response to the proposition that the children of illegal aliens should be denied an education).

²⁹ 457 U.S. 202 (1982).

³⁰ *Id.* at 230. See also Michael D. Simpson, *Backlash Puts Kids at Risk*, NEA TODAY, Feb. 1995, at 17 (noting that "[t]o the casual observer, the Court's decision in *Plyler* should end the matter: the Supreme Court has spoken").

³¹ See, e.g., Simpson, *supra* note 30, at 17 (observing that the *Plyler* decision was five to four and that since the decision the composition of the Court has changed); see also *infra* note 43 and accompanying text. For an in-depth examination of the perceived changes, see *infra* Part III.

³² For a thoughtful commentary and analysis on the continued validity of *Plyler* and how the decision might be utilized to aid poverty-stricken disadvantaged children in a school choice context, see Stuart Biegel, *The Wisdom of Plyler v. Doe*, 17 CHICANO-LATINO L. REV. 46 (1995).

³³ See Grandrath, *supra* note 4, at 750.

³⁴ See David Hiller, *Immigration Policies of the Reagan Administration*, 44 U. PITT. L. REV. 495, 496 (1983).

³⁵ See Grandrath, *supra* note 4, at 751.

³⁶ The Gallegly Amendment was named after its author, Elton Gallegly, of the U.S. House of Representatives. The goal of the Gallegly Amendment was to allow the states to deny a free public education to illegal immigrant children. Representative Gallegly explained

have allowed states to prohibit illegal immigrant children from obtaining public schooling.³⁷ The Amendment was a part of the 1996 spending bill and was the biggest roadblock to the passage of this decade's most sweeping immigration legislation.³⁸ If approved, the Gallegly Amendment would have taken an

that the purpose of the Amendment was to decrease the amount of money spent on educating illegal immigrant children. He also believed that the Amendment would deter the influx of illegal immigrants. *See* Brian Blomquist, *Feinstein Backs Bill on Illegal Aliens: Says Californians Regret Proposition 187*, WASH. TIMES, June 26, 1996, at A6; Levendosky, *supra* note 2, at 11A; Marcus Stern, *Clinton: Immigration Bill Is Headed for Veto*, SAN DIEGO UNION-TRIB., Aug. 4, 1996, at A1.

The Gallegly Amendment reads, in pertinent part, as follows:

SECTION 1. AUTHORIZING STATES TO DENY PUBLIC EDUCATION BENEFITS TO CERTAIN ALIENS NOT LAWFULLY PRESENT IN THE UNITED STATES.

...

TITLE VI-AUTHORIZING STATES TO DISQUALIFY CERTAIN ALIENS NOT LAWFULLY PRESENT IN THE UNITED STATES FROM PUBLIC EDUCATION BENEFITS

...

SEC. 601. (a) STATEMENT OF POLICY. -Because Congress views that the right to a free public education for aliens who are not lawfully present in the United States promotes violations of the immigration laws and because such a free public education for such aliens creates a significant burden on States' economies and depletes States' limited educational resources, Congress declares it to be a policy of the United States that-

(1) aliens who are not lawfully present in the United States are not entitled to public education benefits in the same matter as United States citizens, nationals, and lawful resident aliens; and

(2) States should not be obligated to provide public education benefits to aliens who are not lawfully present in the United States.

(b) CONSTRUCTION. -Nothing in this section shall be construed as expressing any statement of Federal policy with regard to-

(1) aliens who are lawfully present in the United States,

(2) benefits other than public education benefits provided under State law, or

(3) preventing the exclusion or deportation of aliens unlawfully present in the United States.

H.R. 4134 104th Cong. § 1 (1996).

³⁷ *See* Stern, *supra* note 36, at A1.

³⁸ *See id.* The federal government has made two other attempts to deal with the influx of illegal immigrants into the United States. The first attempt was the passage of the Immigration

estimated 700,000 elementary and secondary school students out of school and placed them on the streets.³⁹ Moreover, the Amendment would have given effect to the school-related portions of California's Proposition 187, which specifically deny illegal immigrant children living in California an education.⁴⁰ After heated debate, the Gallegly Amendment was withdrawn from the appropriations bill prior to the final vote in Congress.⁴¹ Despite this initial defeat, supporters of the Gallegly Amendment now hope to pass the Amendment as independent legislation.⁴²

In December 1996, the Supreme Court stated that children's issues are of basic importance in our society and that, accordingly, the Court will closely examine any measure that intrudes upon children's rights.⁴³ With that in mind,

Reform and Control Act of 1986 (IRCA), which sought to reduce the employment of illegal immigrants in the United States. IRCA makes it illegal for employers to knowingly hire, recruit, or refer undocumented workers for a fee. Fines and jail time are the penalties imposed for a violation of this law. The second attempt was the enactment of the North American Free Trade Agreement (NAFTA), which Congress enacted to encourage free trade between the United States and Mexico. Congress also believed that NAFTA would indirectly decrease the influx of illegal immigrants. While curbing the illegal immigrant population was not the principal motive behind the legislation, it was a factor considered by Congress. It is still too early to determine whether NAFTA has had an effect on the influx of illegal immigrants into the United States. See Grandrath, *supra* note 4, at 765-72.

³⁹ See Grandrath, *supra* note 4, at 752-72.

⁴⁰ See Blomquist, *supra* note 36, at A6.

⁴¹ See *Clinton and Dole Differ Only on How Far to Pull in the Welcome Mat*, SUN SENTINEL, Oct. 19, 1996, at 14A [hereinafter *Clinton and Dole*]. For a more detailed explanation of how and why the Gallegly Amendment was dropped out of the bill prior to the final vote, see discussion *infra* Part IV.

⁴² See Rich Harris, *Governor Introduces Replacement for Outgoing Official*, ASSOCIATED PRESS POL. SERV., Oct. 1, 1996.

⁴³ See *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996).

Since *Plyler v. Doe*, there has been a change in the composition of the Supreme Court. In 1982, Justices William Brennan, Thurgood Marshall, and Lewis Powell were part of the five to four majority. In the fifteen years that have elapsed since the decision, more conservative Justices Clarence Thomas and Anthony M. Kennedy joined the Court. Some view the *Plyler* decision as a liberal Court mandate, thus likely to be overturned by today's more conservative Justices. The December 1996 decision in *M.L.B. v. S.L.J.*, however, offers evidence that today's Court is not as conservative as some may think. In that decision, the Court held that a state cannot deny, on the basis of an individual's poverty, appellate review of the sufficiency of evidence on which a trial court based a parental termination decree. That case, like *Plyler*, was decided on the basis of the Equal Protection Clause of the Fourteenth Amendment and the Court made clear that interests involving family relations are different from other civil cases and will be examined with the utmost care. See *M.L.B.*, 117 S. Ct. at 555; Herman Schwartz, *Entitlements for Undocumented Aliens: Is California's Proposition 187 Constitutional? No: The Law is Clear, Only the Court Has Changed*, 81

this Note carefully examines the interests allegedly advanced by the Gallegly Amendment to determine the merits of the debate about educating illegal immigrants in 1997. It discusses the continued viability of the Court's reasoning in *Plyler v. Doe* and demonstrates that *Plyler* is still good law. Part II of this Note first presents the foundations of the controversy over the education of illegal immigrant children by exploring the Supreme Court's decision in *Plyler*. This Note then explains how these foundational concerns have developed into the current debate over the education of illegal immigrant children. Part III examines the interests allegedly advanced by the Gallegly Amendment and explains why those alleged interests do not justify the denial of public education to illegal immigrant children. The applicability of the Court's rationale in *Plyler* to the current debate will also be discussed. Part IV suggests that the cleverly devised scheme behind the Gallegly Amendment was partisan politics, and that legislators turned the proposed denial of public education to illegal immigrant children into an election strategy in the 1996 presidential race. Finally, Part V concludes with an analysis of the current state of the debate over the education of illegal immigrant children and suggests better solutions for the resolution of this immigration problem.

II. THE STATE OF THE CONTROVERSY

A. *Plyler v. Doe*

In 1975, the Texas Legislature passed a statute that withheld funding from local school districts which educated illegal immigrant children and authorized local school districts to deny enrollment to these children.⁴⁴ As illegal

A.B.A. J., Feb. 1995, at 43.

⁴⁴ See *Plyler v. Doe*, 457 U.S. 202, 205 (1982). The Texas statute provided, in pertinent part:

(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the free public schools of the district in which he resides or in which his parent, guardian or the person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are

immigrant children would henceforth be denied the benefit of a public education, the plaintiffs filed a class action suit in federal district court⁴⁵ on behalf of school-age children who resided within the school district and who could not establish that they were legally admitted into the United States.⁴⁶ The plaintiffs sued the Superintendent and members of the Board of Trustees of the school district.⁴⁷ The plaintiffs sought injunctive and declaratory relief.⁴⁸

In reviewing the constitutional challenge to the Texas statute, the district court enjoined the defendants from denying a free public education to the plaintiff class.⁴⁹ In an extremely important decision, the district court held that the Equal Protection Clause of the Fourteenth Amendment extended to illegal immigrants and that the Texas statute violated the Equal Protection Clause and was, therefore, unconstitutional.⁵⁰ Additionally, the district court held that the Supremacy Clause was violated because federal law pre-empted the state statute.⁵¹ The court reasoned that neither the Texas statute nor the school

either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

TEXAS EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981), *cited in Plyler*, 457 U.S. at 205.

⁴⁵ For an interesting commentary on the role of judicial discretion in the *Plyler* decision written by a judge in that case, see William Wayne Justice, *Putting the Judge Back in Judging*, 63 U. COLO. L. REV. 441, 442 (1992) (stating that "*Plyler v. Doe* is the only case from [his] court where the Supreme Court rendered a decision on the merits").

⁴⁶ See *Plyler*, 457 U.S. at 206. Despite the passage of the statute in 1975, the school district continued to educate illegal immigrant children until the 1977–1978 academic year. In July 1977, the school district changed its policy and gave effect to the Texas statute in question. See *id.* at 206 n.2.

⁴⁷ *Id.* at 206. The State of Texas intervened as a third-party defendant. *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* Initially, the district court did find that the Texas statute was unconstitutional, but it would not issue relief for the entire state of Texas because the evidence at trial was specifically limited to the school district in question. In response, sixteen new district court actions were filed in Texas and were consolidated for trial in the Southern District of Texas. The court held a six-week trial and finally issued a state-wide injunction declaring the Texas statute unconstitutional. See *Doe v. Plyler*, 458 F. Supp. 569 (E.D. Tex. 1978); *Doe v. Plyler*, 628 F.2d 448 (5th Cir. 1980); *In re Alien Children Educ. Litig.*, 501 F. Supp. 544 (S.D. Tex. 1980).

⁵⁰ *Plyler*, 458 F. Supp. at 592–93. The Fourteenth Amendment provides, in pertinent part, "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

⁵¹ *Plyler*, 458 F. Supp. at 590–92. The court found that the Texas statute was inconsistent with the national regulation scheme under the Immigration and Nationality Act

district policy implementing it had "either the purpose or the effect of keeping illegal aliens out of the State of Texas."⁵² The district court also addressed the economic justification for the statute⁵³ and stated that while barring illegal immigrant children from public schools could possibly save money for the school district, it would not improve the quality of public education.⁵⁴ Further, the court recognized that "the illegal alien of today may well be the legal alien of tomorrow" and that absent an education, these children "[a]lready disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, . . . will become permanently locked into the lowest socioeconomic class."⁵⁵ While the court suggested that "the state's exclusion of undocumented children from its public schools . . . may well be the type of invidiously motivated state action for which the suspect classification doctrine was designed," the district court felt that it did not need to decide whether strict scrutiny applied because the law was not even supported by a

and with federal laws pertaining to funding and discrimination in education. *Id.*

⁵² *Id.* at 575.

⁵³ *Id.* at 575-76. Those opposing the Texas statute believed that the state's policy of denying a public education to illegal immigrant children was unjustifiable even from an economic point of view because it would foster a "ghetto of ignorance." Moreover, they asserted that as one of the richest states in the nation, with a tax surplus of more than two billion dollars in 1980, the economic argument for denying an education to illegal immigrant children was unjustified. See Hull, *supra* note 2, at 415; see also John M. Crewdson, *Access to Free Education for Illegal Alien Children*, N.Y. TIMES, Aug. 26, 1980, at B10.

⁵⁴ *Plyler*, 458 F. Supp. at 575-76. The Supreme Court unequivocally recognized the importance of education as a public interest. See *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

⁵⁵ *Plyler*, 458 F. Supp. at 575-78. See PANEL ON HIGH-RISK YOUTH, COMM'N ON BEHAV. & SOC. SCI. & EDUC., LOSING GENERATIONS: ADOLESCENTS IN HIGH-RISK SETTINGS (1993) [hereinafter HIGH-RISK YOUTH]:

Economic and social stratification influence many key aspects of the educational system. The homogeneous composition of many schools stems directly from neighborhood stratification on the basis of family income, race, and ethnicity. Public expenditures for education, when dependent largely on local wealth, serve to further stratify the educational experiences of adolescents simply on the basis of their family background. Consequently . . . students from low-income families usually attend schools in poor neighborhoods where they confront conditions not experienced by students from more advantaged backgrounds. These conditions, such as a relative lack of safety and the lowest level curriculum and performance expectations, have independent effects on school achievement. As a result, many students whose lives are rooted in family or neighborhood poverty simply do not have the kind of day-to-day experiences that would stimulate their intellectual development and complement the mission of schools.

Id. at 105-06.

rational basis.⁵⁶

The Court of Appeals for the Fifth Circuit affirmed the district court with respect to its ruling on the Equal Protection Clause, but disagreed with the Supremacy Clause ruling.⁵⁷ With respect to the standard of review, the court of appeals stated that the statute was "constitutionally infirm regardless of whether it [was] tested using the mere rational basis standard or some more stringent test."⁵⁸

Finally, the case reached the United States Supreme Court in 1981, where the Court affirmed the court of appeals's decision.⁵⁹ The Court agreed that the Texas statute violated the Equal Protection Clause of the Fourteenth Amendment⁶⁰ and that it was not a violation of the Supremacy Clause.⁶¹ The Supreme Court also concluded that the Texas law denying illegal immigrant children the right to a public education infringed upon important interests of a burdened class.⁶² Writing for the majority, Justice Brennan made analogies to the Court's illegitimacy jurisprudence and reasoned that it would defy "fundamental conceptions of justice" to punish illegal immigrant children for the actions of their parents.⁶³ Moreover, Brennan recognized education as an

⁵⁶ See *Plyler*, 458 F. Supp. at 585. For a detailed analysis on the standard of review used in *Plyler*, see John T. Ritondo, Jr., Comment, *California's Duty to Educate the World: Proposition 187 and Mere Rationality*, 26 CUMB. L. REV. 1045 (1996).

⁵⁷ See *Doe v. Plyler*, 628 F.2d 448, 450, 461 (1980). The court of appeals disagreed that federal law pre-empted the statute. The court of appeals found no express or implied policy favoring the education of illegal immigrant children and, therefore, concluded that there was no conflict between state and federal law. *Id.* at 454-58.

⁵⁸ *Id.* at 458.

⁵⁹ *Plyler*, 457 U.S. at 230.

⁶⁰ *Id.* at 210. With respect to the Equal Protection Clause ruling, the Court stated that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of the law by the Fifth and Fourteenth Amendments." *Id.* (citing *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)). For an Equal Protection analysis of *Plyler v. Doe*, see *The Birthright Citizenship Amendment: A Threat to Equality*, 107 HARV. L. REV. 1026, 1033-35 (1994); Hull, *supra* note 2, at 409-46.

⁶¹ *Plyler*, 457 U.S. at 224-26.

⁶² *Id.*

⁶³ *Id.* at 220 (stating that the children "can affect neither their parents' conduct nor their own status") (citing *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)). The Court has long held that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Gomez v. Perez*, 409 U.S. 535, 538 (1973). See Susan E. Babb, Note, *Analysis of an Analogy: Undocumented Children and Illegitimate Children*, 1983 U. ILL. L. REV. 697, 707. The Court has found that classifications based on illegitimacy are permissible if the classifications are used in the context of determining dependency. See *Mathews v. Lucas*, 427 U.S. 495, 516 (1976).

important interest that plays a "fundamental role in maintaining the fabric of our society."⁶⁴ Justice Brennan also stated that determining the appropriate level of review in this case required more than identifying a suspect class or a fundamental right.⁶⁵ Instead, he examined the unavoidable consequences of denying these children the right to a free education.⁶⁶ He stated that "[b]y denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."⁶⁷ Accordingly, Brennan concluded that heightened scrutiny was the appropriate standard of review and that, under that standard, the Texas statute was unconstitutional.⁶⁸ The current debate over the education of illegal immigrant children is inextricably tied to the *Plyler* decision.⁶⁹ The Supreme Court's word is law. The Court spoke clearly on the issue of educating illegal immigrant children, and yet fifteen years later, the issue refuses to go away.

B. *The Current Debate*

Within the past five years, both state and federal legislation calling for the removal of illegal immigrant children from public schools in direct contrast to the Supreme Court's holding in *Plyler* has been introduced.⁷⁰ California's Proposition 187, which directly challenges *Plyler* at the state level by denying

⁶⁴ *Plyler*, 457 U.S. at 221.

⁶⁵ *Id.* at 223.

⁶⁶ *Id.* at 205.

⁶⁷ *Id.* at 223. The Panel on High Risk Youth of the Commission on Behavioral and Social Sciences and Education critically analyzed the presence of a growing underclass of youths who are not responsible for their socioeconomic status. The panel's report principally examined the educational contexts and settings that have seriously deteriorated in recent decades. The report shed light on the harmful impact of the deterioration on today's students. See HIGH-RISK YOUTH, *supra* note 55, at 13, 102, 236-37. It is also important to note that these socially and economically disadvantaged students clearly would not have the financial resources to fulfill any tuition requirement implemented by public schools or in a private school context. See generally *Bigger, Deeper, Younger, Getting Worse*, N.Y. TIMES, Oct. 10, 1993, § 4 at 5; Sylvia Nasar, *Rich and Poor Likely to Remain So*, N.Y. TIMES, May 18, 1992, at D1; Leonard Silk, *Rich and Poor: The Gap Widens*, N.Y. TIMES, May 12, 1989, at D2.

⁶⁸ *Plyler*, 457 U.S. at 221.

⁶⁹ See Biegel, *supra* note 32, at 63 (stating that the Court's analysis in *Plyler* and the applicability of the decision in the 1990s will play a pivotal role in the Supreme Court's ultimate decision on this issue).

⁷⁰ See Phillip J. Cooper, *Plyler at the Core: Understanding the Proposition 187 Challenge*, 17 CHICANO-LATINO L. REV. 64, 64 (1995).

public schooling to illegal immigrant children, is one such example.⁷¹ Similarly, the proposed Gallegly Amendment directly challenges *Plyler* at the federal level by allowing states to prohibit illegal immigrant children from attending public schools.⁷² Although challenges to Proposition 187 have not yet reached the Supreme Court, and although the Gallegly Amendment was pulled out of Congress prior to a final vote,⁷³ many commentators believe that the Supreme Court ultimately will be forced to revisit the issue of educating illegal immigrant children.⁷⁴ While some commentators feel that the debate will ultimately turn on the issue of federalism, no one denies the importance of the *Plyler* decision.⁷⁵ The Supreme Court's analysis in *Plyler* and *Plyler's* applicability today will play a critical role in the Supreme Court's future decisionmaking on the education of illegal immigrant children.⁷⁶

III. THE "NEW" CONCERNS

Supporters of the Gallegly Amendment argue that *Plyler* is no longer good law because of changed circumstances. They argue that the ever-growing illegal immigrant population has consequences in the United States today that were unforeseeable in 1982.⁷⁷ Illegal immigration is no longer seen by citizens as the

⁷¹ Proposition 187 is designed to remove from school and place on the streets 300,000 illegal immigrant children. See Gregory J. Ehardt, *Why California's Proposition 187 Is a Decision for the U.S. Supreme Court*, 3 TULSA J. COMP. & INT'L L. 293, 306 (1996); Simpson, *supra* note 30, at 17.

⁷² See Brian Blomquist, *Senators Resist Ban on School for Aliens*, WASH. TIMES, July 3, 1996, at A4.

⁷³ See Clinton and Dole, *supra* note 41, at 14A. Because President Clinton expressed opposition to the Gallegly Amendment and threatened to veto the entire spending bill if the Amendment was included, at the last minute the Amendment was withdrawn from the bill. *Id.* For a more detailed discussion, see *infra* Part IV.

⁷⁴ See Ehardt, *supra* note 71, at 310; see also Anne C. Lewis, *Educating Immigrants*, EDUC. DIGEST, Nov. 1994, at 68 (explaining that political passion about immigration may result in U.S. Supreme Court review of its decision that illegal immigrant children cannot be denied a free public school education).

⁷⁵ See Tom Gerety, *Children in the Labyrinth: The Complexities of Plyler v. Doe*, 44 U. PITT. L. REV. 379 (1983); Hull, *supra* note 2, at 428. *Plyler* failed to clarify the issue of federalism that exists in this context. Namely, the Court stressed that state attempts to deter undocumented entry into the United States would be upheld if the state demonstrated that the attempts were a means of achieving important governmental interests or that the state had congressional authorization. Moreover, the decision clearly did not preclude congressional measures that would deny illegal immigrants an education. See *id.*

⁷⁶ See Biegel, *supra* note 32, at 63.

⁷⁷ See Gerald F. Seib, *Welcome to America in the Year the Backlash Against Immigration Entered the Mainstream*, WALL ST. J., Sept. 27, 1996, at A20.

purely economic issue of whether aliens are taking away Americans' jobs.⁷⁸ Rather, many citizens now feel that the immigration problem is "tied up with a fraying of the social order" and that it relates more closely with social problems such as the increasing crime rate or drug problems.⁷⁹ Those who oppose the public education of illegal immigrant children argue that illegal immigration in this country has increased,⁸⁰ that the INS has been unsuccessful in its attempts to mitigate the effects of immigration,⁸¹ and that definitive steps must be taken to stop illegal immigration.⁸²

But because illegal immigrants are a "blessing,"⁸³ not a burden, both Republican and Democratic lawmakers united to pressure supporters of the Gallegly Amendment to drop the "ill-advised" idea of denying an education to illegal immigrant children.⁸⁴ Moreover, voices as diverse as *The Wall Street Journal*, teachers, social workers, unions, medical associations, and Hollywood have united to oppose legislative efforts to deny illegal immigrant children a

⁷⁸ See Espenshade & Calhoun, *supra* note 13, at 189.

⁷⁹ See Seib, *supra* note 77, at A20.

⁸⁰ See Reenah Shah Stamets, *The Debate over Illegal Immigrants*, ST. PETERSBURG TIMES, Mar. 18, 1994, at A1. In reality, however, INS statistics show that the immigration rate has *decreased* since the late 1980s and early 1990s. See Seib, *supra* note 77, at A20.

⁸¹ See George C. Church, *Send Back Your Tired, Your Poor . . .*, TIME, June 21, 1993, at 26. For specific commentary on the effects of immigration on the population of the United States, see Auster et. al., *supra* note 7, at 90:

America does not have the virgin territory and expanding industrial production it had at the beginning of the century, when we last had wide-open immigration. We are bursting at the seams in highway usage and overcrowded schools and prisons, to cite just a couple of symptoms, especially in areas where new immigrants are concentrating. Fresh water resources and landfill capacity are overtaxed. As we have learned more about the population size and the environment, we have learned that rapid population growth is one of the issues we must deal with. To do so, we must reduce immigration.

Id. Those who support immigration to the United States, however, see this concern about population growth as the "hidden agenda" underlying environmentalists' anti-immigrant sentiments. See *id.* at 95.

⁸² See Auster et. al., *supra* note 7, at 92.

⁸³ See Unz, *supra* note 27, at 33 (stating that with suitable government policies immigrants are a blessing); see also Ehardt, *supra* note 71, at 309-10 (exploring the argument that immigration is good for the United States).

⁸⁴ See Tim Cornwell, *Right Veers from Immigrant Bill*, TIMES EDUC. SUPP., July 5, 1996, at 18. The issue of the education of illegal immigrant children has not been clearly divided by political affiliation. In actuality, most Democratic and Republican lawmakers have taken the position that immigration in the United States is a problem that has to be solved. What varies, however, is the perceived solution to the problem. See discussion *infra* Part IV.

public education.⁸⁵

A. *The Influx of Illegal Immigrants*

Today, those who oppose the public education of illegal immigrant children argue that granting a free public education to these children provides an incentive for other immigrants to come to this country illegally.⁸⁶ Yet, one must seriously question whether depriving illegal immigrant children an education actually will accomplish the goal of curbing the influx of illegal immigrants.⁸⁷

In the *Plyler* case, Texas argued that because the state had an interest in preventing the influx of illegal immigrants, the denial of free public education to illegal immigrant children was justified.⁸⁸ The Court was not persuaded that such legislation "offer[ed] an effective method of dealing with an urgent demographic or economic problem."⁸⁹ Justice Brennan observed that there was no evidence in the record suggesting that illegal immigrants cause any notable burden on the economy.⁹⁰ Thus, even if the Court had made the "doubtful" assumption that immigrants had a negative impact on the economy, the Court still would have concluded that depriving illegal immigrant children an education constituted a "ludicrously ineffectual attempt to stem the tide of illegal immigration," at least when compared with the alternative of prohibiting the employment of illegal immigrants."⁹¹

The *Plyler* Court's reasoning is certainly relevant today. In congressional debate over the Gallegly Amendment, the words of Representative Green of Texas reflect the enduring wisdom of the Court's rationale in *Plyler*. He stated:

*People do not come to this country to put their kids in public school. The children do not come here because of their own volition. They come here because somebody brings them. And to punish a 10-year-old in Texas or a 10-year-old in California who is not here of their own volition and say that they cannot go to public school, it is wrong and this is bad public policy. It is bad public policy on the State level as well as the Federal level.*⁹²

⁸⁵ See Jones, *supra* note 6, at 3.

⁸⁶ See Grandrath, *supra* note 4, at 773.

⁸⁷ See 142 CONG. REC. H11091, H11097-98 (daily ed. Sept. 25, 1996) (statement of Rep. Bryant).

⁸⁸ See *Plyler v. Doe*, 457 U.S. 202, 228 (1982).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 228-29 (quoting *Doe v. Plyler*, 458 F. Supp. 569, 585 (E.D. Tex. 1978)).

⁹² See 142 CONG. REC. H11091, H11104 (daily ed. Sept. 25, 1996) (statement of Rep. Green) (emphasis added). President Clinton, fiercely opposed to the Gallegly Amendment,

Even in the fifteen years that have elapsed since *Plyler*, no study has shown that illegal immigrants travel to this country to get their children an education.⁹³ In fact, experts that have studied the reasons for illegal immigration into the United States call the Gallegly Amendment a mistake.⁹⁴ A Jordan Commission report, which marked the beginning of the effort to alter the existing immigration laws, did not advocate prohibiting illegal immigrant children from obtaining a free public education precisely because "illegal immigrants *do not come here to get their kids in school; they come here to get a job.*"⁹⁵ Accordingly, the interests allegedly advanced by the Gallegly Amendment do not justify this harsh rule.⁹⁶

Contrary to the alleged interests advanced by the Gallegly Amendment, studies have shown that the performance of today's second generation immigrants is critically determinative of the long-term effects that immigration will have on American society.⁹⁷ A 1994 study conducted by Leif Jensen and Yoshimi Chitose of The Pennsylvania State University examined the long-term consequences of the performance of second generation immigrants⁹⁸ and found that if immigrant children are successful,⁹⁹ they will prove to be a net benefit to the economy.¹⁰⁰ Society has a vested interest in having immigrant children succeed because if immigrant children are unsuccessful, the costs of their maladjustment¹⁰¹ are shifted to society at large.¹⁰² Thus, the actual cost of

referred to the measure as "misguided" and an "unacceptable and ineffective way to fight illegal immigration." See Stern, *supra* note 36, at A1.

⁹³ See 142 CONG. REC. H11091, H11092 (daily ed. Sept. 25, 1996) (statement of Rep. Bryant).

⁹⁴ See *id.*

⁹⁵ 142 CONG. REC. H11091, H11098 (daily ed. Sept. 25, 1996) (statement of Rep. Bryant) (emphasis added). While the principal reason illegal immigrants come to this country is to get a job, it is not clear that illegal immigrants actually take jobs away from citizens. For example, a 1994 study by Vedder, Galloway, and Moore showed that in the aggregate, those states with high immigration populations have significantly lower unemployment rates than those states with fewer immigrants. See Auster et. al., *supra* note 7, at 94.

⁹⁶ See *Don't Bless the Child*, *supra* note 6, at 9.

⁹⁷ See Leif Jensen & Yoshimi Chitose, *Today's Second Generation: Evidence from the 1990 U.S. Census*, 28 INT'L MIGRATION REV. 714, 732 (1994).

⁹⁸ *Id.* at 714. The study provided a statistical portrait of second generation immigrants by analyzing the data from the 1990 U.S. Census of Population and Housing. *Id.*

⁹⁹ *Id.* at 715. The study measured "success" as the ability to live above poverty thresholds, level of education, English-speaking ability, employment, and occupational earnings. *Id.* at 733.

¹⁰⁰ *Id.* at 715.

¹⁰¹ *Id.* at 714. Maladjustment is considered in terms of social and economic status in the United States. *Id.* It is important to consider the additional societal costs that will inevitably accompany denying illegal immigrant children an education. For a more detailed discussion,

illegal immigrant children is central to the immigration debate.¹⁰³

B. *Cost: The Crux of the Issue*

The Court's reasoning in *Plyler* applies to the focal point of today's controversy: the cost of illegal immigrants.¹⁰⁴ In 1982, the *Plyler* Court rejected Texas's argument that lowering costs was a sufficient interest to justify the denial of education to illegal immigrant children.¹⁰⁵ The Supreme Court observed that there was no evidence offered to show that illegal immigrants were a drain on the economy.¹⁰⁶ Similarly, the Court dismissed Texas's claim that it could deny illegal immigrant children an education because it had an interest in preserving the state's limited educational resources because the state failed to offer any "credible supporting evidence that a proportionately small diminution of the funds spent on each child . . . will have a grave impact on the quality of education."¹⁰⁷ Moreover, the Court concluded that the need to preserve resources, standing alone, did not justify denying those resources to a particular group.¹⁰⁸ The Court's conclusions are equally appropriate today in the debate over the Gallegly Amendment.¹⁰⁹

see *infra* subpart B.

¹⁰² See Alejandro Portes, *Introduction: Immigration and Its Aftermath*, 28 INT'L MIGRATION REV. 633, 635 (1994).

¹⁰³ See Jensen, *supra* note 97, at 715.

¹⁰⁴ See, e.g., Adams, *supra* note 8, at 8A (asserting that nobody actually knows the cost that illegal immigrants pose on society); Gerety, *supra* note 75, at 387 (referencing the impact that illegal immigrant children have on educational resources); Grandrath, *supra* note 4, at 783-98 (stating that immigrants have financially burdened the states); Ron Hutchison, *A Look at Divisive Issues: The CNN Program Explores the Stances that Americans Take*, CHARLESTON GAZETTE & DAILY MAIL, Sept. 28, 1996, at 10A (explaining the annual cost of immigrants and the positive impact they have on the economy); Lynn Schnaiberg, *O.M.B. Study Puts Price Tag on Educating Illegal Immigrants*, EDUC. WK., Sept. 21, 1994, at 18 (referring to an Urban Institute study on the cost of illegal immigrants).

¹⁰⁵ See *Plyler v. Doe*, 457 U.S. 202, 228 (1982).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 229.

¹⁰⁸ *Id.* at 229 n.25.

¹⁰⁹ As one commentator suggested: "[the Gallegly Amendment] would create by deliberate design a growing underclass of illiterate young people denied the opportunity to learn English, much less acquire the basic education required to get a job . . . and support themselves." *Kill Gallegly Amendment: President Should Sign Immigration Reform Bill*, SAN DIEGO UNION-TRIB., Sept. 19, 1996, at B10 [hereinafter *Kill Gallegly Amendment*]; see also Cynthia Webb Brooks, *Health Care Reform, Immigration Laws, and Federally Mandated Medical Services: Impact of Illegal Immigration*, 17 HOUS. J. INT'L. L. 141, 147 (1994); Ehardt, *supra* note 71, at 309; Jensen, *supra* note 97, at 714-15; Unz, *supra* note 27, at 34;

Immigrants-rights activists have long held the belief that immigrants are not a drain¹¹⁰ on the economy.¹¹¹ Those who support educating illegal immigrant children assert that illegal immigrants actually benefit America's economy.¹¹² Julian Simon, a professor of economics at the University of Maryland, states that "general immigration causes little or no unemployment" and that immigrants actually "make jobs."¹¹³ Moreover, *The Wall Street Journal* feels that immigration is so beneficial that it goes so far as to recommend that the United States adopt a "five-word constitutional Amendment: There shall be open borders."¹¹⁴

Studies support the view that immigration is beneficial to the economy.¹¹⁵ In fact, immigrants pay between \$12,000 and \$20,000 more to the U.S.

Eustace T. Francis, Note, *Taking Care of Business: The Potential Impact of Immigration Reform on Corporate Strategic Planning*, 5 GEO. IMMIGR. L.J. 79, 81 (1991); Adams, *supra* note 8, at 8A; *Immigrants Are Plus to California, Study Says Legal or Illegal, They Return More in Taxes Over Lifetime*, SAN DIEGO UNION-TRIB., June 11, 1996, at A3 [hereinafter *Lifetime*]; George Ramos, *Immigrants a Boon to State, Study Says*, L.A. TIMES, June 10, 1996, at A3.

¹¹⁰ For an interesting study concerning how the assimilation of second generation immigrants affects the economy, see M. Patricia Fernández-Kelly & Richard Schaufli, *Divided Fates: Immigrant Children in a Restructured U.S. Economy*, 28 INT'L MIGRATION REV. 662 (1994).

¹¹¹ See Ramos, *supra* note 109, at A3.

¹¹² See, e.g., Unz, *supra* note 27, at 33 (stating that the only way of making illegal immigrants' low-paying jobs attractive to native-born Americans would be "to raise the wage to \$10 or \$12 per hour, at which level the job[s] would cease to exist—this is Economics 101"); Ramos, *supra* note 109, at A13 (citing a Rand Corporation study which concluded that immigrants were an "economic asset").

¹¹³ See Daniel James, *To Cut Spending, Freeze Immigration*, WALL ST. J., June 24, 1993, at A13.

¹¹⁴ *Id.* See also Steve Weinberg, *Increased Immigration Is Humanitarian and Healthy; Controversy: Neither Side of the Debate Clarifies the Issue, and the Truth Favors Open Borders*, THE BALTIMORE SUN, Nov. 10, 1996, at 1F (asserting that immigration is a moral question and that the United States should create policy in favor of open borders).

Although *The Wall Street Journal* is traditionally known as a conservative publication, it is not unusual that the publication is in support of immigration. The issue of immigration is clearly not confined to traditional conservative or liberal values. In fact, several conservative commentators have voiced positions in support of immigration. See Auster et. al., *supra* note 7, at 96 (statement by Ron Unz that his "position [in support of] immigration represents the pragmatic, centrist view of mainstream conservatism, avoiding both the open borders utopian of extreme libertarians and the closed borders hysteria of extreme environmentalists").

¹¹⁵ See Brooks, *supra* note 109, at 147; Ehardt, *supra* note 71, at 309-10; Jensen, *supra* note 97, at 715; Unz, *supra* note 27, at 34; Francis, *supra* note 109, at 81; Adams, *supra* note 8, at 8A; Ramos, *supra* note 109, at A3.

government in taxes than they exhaust in government services.¹¹⁶ Additionally, a U.S. Bureau of Labor Statistics study demonstrates that immigrants consume less welfare assistance and governmental aid than do native-born Americans, and yet these citizens are supported without question.¹¹⁷ In 1996, a study on the economics of illegal immigrants was conducted by the Tomas Rivera Center¹¹⁸ in California¹¹⁹ based on the premise that most of the state's immigrants will remain in the United States long-term and will pay taxes over a lifetime.¹²⁰ The study found that the economic benefits conferred on California by illegal immigrants far outweighed the costs to the state.¹²¹ Specifically, the study found that an immigrant educated in California receives an average of \$62,600 in education costs, but pays an average of \$89,437 in state income and sales taxes to education alone over a period of more than forty years of employment.¹²² Further, when tax revenues and costs for education and social services are combined, illegal immigrants in California return a net surplus of \$7890 to the government over a lifetime of employment.¹²³

Those who want to deny illegal immigrant children a public education do not agree with these statistics. A study by Economics Professor Donald Huddle of Rice University, for example, shows that government services provided to illegal immigrants in 1993 amounted to an astounding \$44.2 billion dollars nationally.¹²⁴ This number, however, fails to account for the taxes that illegal immigrants pay back to the government.¹²⁵ In order to have an honest debate

¹¹⁶ See 136 CONG. REC. H8712, H8718 (daily ed. Oct. 3, 1990) (statement of Rep. Miller); Ehardt, *supra* note 71, at 310.

¹¹⁷ See *id.* Commentator Ron Unz suggests that anti-immigrant sentiments are only a means of avoiding the real problem: our nation's dependence on the welfare system. See Unz, *supra* note 27, at 33.

¹¹⁸ See Ramos, *supra* note 109, at A3. The Tomas Rivera Center is a nonprofit public policy research institute affiliated with the Claremont Graduate School. *Id.* at A13.

¹¹⁹ See *id.* at A3. The data for the study was supplied by the California Department of Education, the California Post-Secondary Education Commission, the National Center of Education Statistics and the California Department of Finance. *Id.*

¹²⁰ *Id.* This approach takes into account the reality that most illegal immigrants in the United States stay in the country for the duration of their lives. This reality was recognized by the district court in *Plyler v. Doe* when it stated that "the illegal alien of today may well be the legal alien of tomorrow." For all intensive purposes, the district court acknowledged that illegal immigrant children are inevitably members of American society, regardless of their legal status. See *Doe v. Plyler*, 458 F. Supp. 569, 575-78 (1978).

¹²¹ See Ramos, *supra* note 109, at A3.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See Auster et. al., *supra* note 7, at 90-91.

¹²⁵ See *id.* at 95.

about the cost of illegal immigration, critics must recognize what illegal immigrants *contribute*.¹²⁶ For example, when an illegal immigrant buys an article of clothing, a car, or furniture, they pay the same amount of sales tax that a legal citizen does.¹²⁷ If they own property, they pay property taxes.¹²⁸ If they rent, the property tax is included in their rent.¹²⁹

Moreover, one cannot simply ignore the societal costs that will result if illegal immigrant children are denied an education. Law enforcement costs will increase¹³⁰ to ensure these children do not get into trouble,¹³¹ as statistics indicate that more than forty percent of juvenile arrests occur during school hours.¹³² When juveniles do get into trouble, it costs an estimated \$24,000 a year to keep the child in juvenile custody,¹³³ and an estimated \$33,000 per year to run youth offender facilities in the state of California alone, regardless of the offender's immigrant status.¹³⁴ A UCLA study determined that each child denied schooling will cost the Los Angeles government \$6100 in police costs, judicial and penal costs, and health, welfare, and employment services.¹³⁵ Further, teenage pregnancy rates will rise dramatically, which will increase emergency medical service costs and intensive care expenses for premature

¹²⁶ See 142 CONG. REC. H11091, H11100 (daily ed. Sept. 25, 1996) (statement of Rep. Becerra).

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ The increase in crime and law enforcement costs is the reason that law enforcement organizations are in strong opposition to the Gallegly Amendment. See, e.g., 142 CONG. REC. H11091, H11095 (daily ed. Sept. 25, 1996) (statement of Rep. Becerra). Using police officers to ensure that children stay out of trouble is only one way of looking at increased law enforcement costs. That is, one may consider whether the purpose of law enforcement is to keep kids out of trouble or to protect citizens from the bad acts of the troubled kids. In either case, law enforcement costs will rise as a result of leaving the uneducated children with no option but the evils of the streets.

¹³¹ See 142 CONG. REC. H11091, H11101 (daily ed. Sept. 25, 1996) (statement of Rep. Becerra); see also Cornwell, *supra* note 84, at 18 (observing that critics of the Gallegly Amendment in the Senate said it would "throw innocent children out on the streets and into the hands of gangs").

¹³² See Senator John Sandy, Editorial, *Revoking Drop-outs' Driver's Licenses Could Keep Teens in School*, THE IDAHO STATESMAN, Mar. 7, 1996, at 10A.

¹³³ See Laura Allen, *Candidate Wants State to Raise Dropout Age*, THE TAMPA TRIB., Oct. 24, 1996, at 1.

¹³⁴ See 142 CONG. REC. H11091, H11101 (daily ed. Sept. 25, 1996) (statement of Rep. Becerra).

¹³⁵ See 142 CONG. REC. S10901, S10901 (daily ed. Sept. 19, 1996) (statement of Sen. Kennedy).

babies.¹³⁶ When assessing the validity of the Gallegly Amendment, the additional societal costs of failing to educate the children of illegal immigrants cannot be ignored.

IV. THE HIDDEN AGENDA: THE GALLEGLY AMENDMENT AS A POLITICAL TOOL

Despite the fact that the number of illegal immigrants entering the United States has been decreasing since the late 1980s and early 1990s,¹³⁷ immigration reform is an increasingly potent public policy issue.¹³⁸ Partisan politics is the underlying reason why immigration has remained center-stage on the nation's agenda since 1982.¹³⁹ Immigration reform has turned into a political football

¹³⁶ See *id.*

¹³⁷ See Seib, *supra* note 77, at A20.

¹³⁸ See Cornwell, *supra* note 84, at 18. Although immigrants benefit the American economy by performing low-wage jobs, some commentators insist that the call for immigration reform is based upon a need to subdue hatred between the United States and Mexico, and minimize potential barriers to NAFTA. See Ehardt, *supra* note 71, at 300.

¹³⁹ See, e.g., Brian Blomquist, *GOP Rift May Sink Immigration-Reform Bill*, WASH. TIMES, Sept. 18, 1996, at A5 (explaining that divisions between Republicans in Congress and Dole's presidential campaign threaten to derail immigration legislation); Blomquist, *supra* note 72, at A4 (calling the Gallegly Amendment a "serious campaign issue, especially in vote-rich California"); Clinton and Dole, *supra* note 41, at 14A (observing that illegal immigration is a hot topic in the 1996 presidential election); Cornwell, *supra* note 84, at 18 (asserting that in "an election year the Gallegly [sic] Amendment plays to rising sentiment against illegal immigration"); Michael Doyle, *House Approves Ending Schooling of Illegal Immigrants*, FRESNO BEE, Mar. 21, 1996, at A4 (stating that the Gallegly Amendment's political prospects are uncertain); Johnson, *supra* note 6, at 111 (noting that partisan politics have prompted an anti-immigrant response); Jones, *supra* note 6, at 3 (explaining that politicians seeking re-election used illegal immigrants as scapegoats in order to gain re-election); *Kill Gallegly Amendment*, *supra* note 109, at B10 (stating that "[s]ome GOP lawmakers would rather let the [immigration] bill die than give President Clinton an opportunity to sign a measure that is popular in vote-rich California"); Levendosky, *supra* note 2, at 11A (remarking that the immigration bill was "mined and booby-trapped with barbaric provisions that betray the humanitarian heritage of our nation—all to gain a political edge"); *An Odious Provision: Gallegly Measure Taints Immigration Reform*, SAN DIEGO UNION-TRIB., Sept. 11, 1996, at B6 [hereinafter *Odious Provision*] (remarking that immigration reform has become entangled in partisan politics and the presidential campaign); Seib, *supra* note 77, at A20 (stating that 1996 will be remembered as "the year when a new, harder attitude toward immigration took hold in the center of the political spectrum"); Stern, *supra* note 36, at A1 (citing that some Republicans relish the prospect of Clinton vetoing an immigration bill during a presidential campaign); *Unalloyed Politics: Election Maneuvers Threaten Immigration Bill*, SAN DIEGO UNION-TRIB., June 4, 1996, at B6 [hereinafter

game,¹⁴⁰ and most recently the Superbowl of immigration reform¹⁴¹ was played during the 1996 presidential election campaign.¹⁴²

The Republican team in this political Superbowl was comprised of some House Republicans and California Governor Pete Wilson.¹⁴³ The team's captain was Bob Dole, Republican presidential nominee in 1996. The strategy of the Republican team was to present the opponent,¹⁴⁴ a Democratic team headed by President Bill Clinton, with significant immigration legislation¹⁴⁵ that Clinton would be forced to veto.¹⁴⁶

At kickoff, the Gallegly Amendment was part of the proposed Illegal Immigration Reform and Immigrant Responsibility Act of 1996,¹⁴⁷ the first major overhaul of federal immigration laws since 1990.¹⁴⁸ Among other things, the Act proposed doubling the size of border patrol, increasing the patrol force

Unalloyed Politics] (explaining that some GOP lawmakers constructed a plan to sacrifice the immigration bill in order to hamper President Clinton's chances for gaining re-election).

¹⁴⁰ See *Unalloyed Politics*, *supra* note 139, at B6 (remarking that immigration reform is too significant to be turned into a "political football" game).

¹⁴¹ See 142 CONG. REC. H11091, H11107 (daily ed. Sept. 25, 1996) (statement of Rep. Conyers that "[t]he only reason we are considering the bill is pure politics").

¹⁴² See, e.g., *Odious Provision*, *supra* note 139, at B6; Blomquist, *supra* note 139, at A5; Blomquist, *supra* note 72, at A4; *Clinton and Dole*, *supra* note 41, at 14A; Cornwell, *supra* note 84, at 18; Doyle, *supra* note 139, at A4; *Kill Gallegly Amendment*, *supra* note 109, at B10; Levendosky, *supra* note 2, at 11A; Seib, *supra* note 77, at A20; Stern, *supra* note 36, at A1; *Unalloyed Politics*, *supra* note 139, at B6.

Immigration reform was also one of the single most influential issues during the congressional elections in 1994. In an effort to avoid an upset among U.S. voters, numerous immigration reform bills were introduced into both the House and the Senate. The bills introduced included reform provisions such as: increased border patrol, night lights spanning a distance of five-miles at the Mexican-American border to prevent illegal entry into the United States, and denying education and safety benefits to illegal immigrants. See H.R. 3860, 103d Cong. (1994); see also Ehardt, *supra* note 71, at 299-300.

For an in-depth analysis of the impact that immigration has on relations between the United States and Mexico, see SECRETARIA DE RELACIONES EXTERIORES, THE MEXICAN LABOR MIGRATION TO THE UNITED STATES OF AMERICA: A BILATERAL PERSPECTIVE FROM MEXICO 265-74 (1994).

¹⁴³ See *Unalloyed Politics*, *supra* note 139, at B6.

¹⁴⁴ See *id.*

¹⁴⁵ See, e.g., *Kill Gallegly Amendment*, *supra* note 109, at B10 (calling the legislation a "sweeping immigration bill" and noting that it is "critically important to California").

¹⁴⁶ See, e.g., Stern, *supra* note 36, at A1 (reporting that some strategists savor the prospect that Clinton will veto the legislation because of the Gallegly Amendment).

¹⁴⁷ See 142 CONG. REC. S10572, S10572-73 (daily ed. Sept. 16, 1996) (statement of Sen. Simpson).

¹⁴⁸ See Blomquist, *supra* note 139 at A5.

by 1000 officers per year for the next five years; establishing pilot projects in five states to experiment with a "worker identification system," whereby employers could call a national database to verify the citizenship of job applicants; imposing increased jail sentences and fines on persons who aid those illegally entering into the United States; and accelerating deportations by affording illegal immigrants only one proceeding and by mandating that deportation take place within ninety days of a judge's mandate.¹⁴⁹

The Republican team hoped to win support for Dole's candidacy in the border states by showing Clinton's "lack of empathy"¹⁵⁰ for the immigration problems in the border states.¹⁵¹ The Republican team's goal was a Dole victory in those states.¹⁵² To prevent Clinton from having to mount a defensive veto strategy, the Democrats threatened an offensive play: a filibuster¹⁵³ of the immigration bill if the Gallegly Amendment was included.¹⁵⁴

Bob Dole's campaign manager, Scott Reed, executed the next play.¹⁵⁵ Reed met with Senator Alan Simpson, a close friend of Dole and the original sponsor of the immigration legislation. Reed threw the ball to Simpson, asking him to "retain the Gallegly Amendment . . . *even if it meant sinking the bill.*"¹⁵⁶ Simpson fumbled the ball and the Clinton team recovered. Senator Simpson flatly denied Reed's proposal and complained openly on the Senate floor that Dole's advisors¹⁵⁷ were obstructing passage of the bill solely to deny

¹⁴⁹ See *Clinton and Dole*, *supra* note 41, at 14A.

¹⁵⁰ Clinton referred to the Gallegly Amendment as "a poison pill" because it would force a veto of the entire bill. See Stern, *supra* note 36, at A1.

¹⁵¹ See Levendosky, *supra* note 2, at 11A.

¹⁵² See *id.* The proposed plan was expected to make it more difficult for Clinton to defeat Dole in the state of California, which represents fifty-four electoral votes: one-fifth of the total electoral votes needed to win the presidency. See *Unalloyed Politics*, *supra* note 139, at B6. The election polls indicated that Clinton had a sizeable lead in the State of California in mid-September while the Amendment was under consideration. See Blomquist, *supra* note 139, at A5.

¹⁵³ Much to the strategists' dismay, various Republicans also threatened a filibuster if the Amendment was contained in the final version of the bill. In fact, forty-seven senators signed a letter opposing the Gallegly Amendment, in an attempt to demonstrate to Senate Majority Leader Trent Lott that they would filibuster if necessary. See Blomquist, *supra* note 72, at A4.

¹⁵⁴ See *Odious Provision*, *supra* note 139, at B6.

¹⁵⁵ See Blomquist, *supra* note 139, at A5.

¹⁵⁶ *Id.* (emphasis added).

¹⁵⁷ It has been argued, however, that the position taken by Dole's campaign advisors to let the immigration bill die was not reflective of Dole's actual position on the issue. See 142 CONG. REC. S10572, S10573 (daily ed. Sept. 16, 1996) (statement of Sen. Simpson that every week for the past two years, Dole has asked him when Congress will have an immigration bill).

Clinton a victory in Congress.¹⁵⁸ He stated, "I can't imagine anything more cynical than not . . . working for [the immigration bill's] passage *on the basis that it is simply going to help the incumbent*. I will not sit and participate in a process that was *only crafted to fail and look good*."¹⁵⁹

When the Republican team sensed that Dole's candidacy was losing ground in California,¹⁶⁰ they began to debate dropping the Gallegly Amendment from the immigration bill if Clinton would promise to approve the legislation.¹⁶¹ They rationalized the changed game plan by saying that it would not be in the "best interest of the country" to kill the legislation over the Gallegly Amendment.¹⁶² Ultimately, in the final minutes of the game, Senator Simpson, the original sponsor of the bill, "played hero" and dropped the Gallegly Amendment from the legislation.¹⁶³ He stated that he would "rather get out the shovels, dig a hole, bury [the immigration bill] and tramp down the dirt than let it be used [as a political tool]."¹⁶⁴

There is an inherent betrayal of democratic ideals in playing the political game this way.¹⁶⁵ To worsen matters, the political strategy was not a hushed whisper in the background of the debate,¹⁶⁶ it was a focal point of newspaper articles¹⁶⁷ and a central theme throughout congressional debates.¹⁶⁸ Inevitably, under a democratic system, legislative measures often become political tools. Using the Gallegly Amendment as a political tool, however, presents a situation quite distinct from the normal course of democratic politics. The use of the Gallegly Amendment as a political tool is outrageous because innocent children are the ones who suffer. The *Plyler* Court sought to protect the interests of these innocent children by shielding them from the "stigma of illiteracy" and granting them an ability to "live within the structure of our civic institutions."¹⁶⁹ Today's strategy-based legislating, however, favors the political game over the needs of the innocent children whose future will ultimately be shaped by the decision on this issue.¹⁷⁰

¹⁵⁸ See Blomquist, *supra* note 139, at A5.

¹⁵⁹ *Id.* (emphasis added).

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² See *Kill Gallegly Amendment*, *supra* note 109, at B10.

¹⁶³ See Levendosky, *supra* note 2, at 11A.

¹⁶⁴ *Id.*

¹⁶⁵ See *id.*

¹⁶⁶ See generally 142 CONG. REC. H11091 (daily ed. Sept. 25, 1996).

¹⁶⁷ See *supra* note 139 and accompanying comments.

¹⁶⁸ See generally 142 CONG. REC. H11091 (daily ed. Sept. 25, 1996).

¹⁶⁹ *Plyler v. Doe*, 457 U.S. 202, 223 (1982).

¹⁷⁰ See Levendosky, *supra* note 2, at 11A. See also *Unalloyed Politics*, *supra* note 139, at B6 (explaining that "Senate conferees are expected to take *their cue from Dole on whether*

V. CONCLUSION

In *Plyler v. Doe*, the Supreme Court rejected Texas's argument that the state statute denying illegal immigrant children a public education promoted legitimate interests, such as preventing the influx of illegal immigrants or improving the state's economy.¹⁷¹ The Court found, instead, that the statute was created to harm illegal immigrants.¹⁷² The Court recognized that the enforcement of such legislation would create a growing underclass of illiterate youths, denied even the smallest opportunity to achieve in this society.¹⁷³ Fifteen years have passed since the *Plyler* decision, yet the holding is no less applicable to resolve the debate today. The Court's rationale clearly addressed the interests advanced in support of the proposed Gallegly Amendment, a modern day version of the Texas plan, and showed these interests to be equally unjustified. The Court did not view controlling the immigrant population and conserving public resources as legitimate state interests overriding the interest in educating illegal immigrant children in 1982, nor should these purported objectives be seen as overriding legitimate interests today. Finally, the Court is unlikely to find the new interests so striking as to ignore a commitment to *stare decisis*.¹⁷⁴

Illegal immigrants will continue to be the scapegoats for America's woes until society is prepared to acknowledge that there is more to the immigration debate than what appears on the surface. A comprehensive study of public opinion toward illegal immigration shows that while citizens are preoccupied with economic consequences, they also form their opinions about immigration based on personal conceptions of culture or race.¹⁷⁵ It is not surprising to find that citizens with the most education are the most receptive to immigration.¹⁷⁶ Educated citizens have experiences which make them more open-minded and which help them to differentiate between valid concerns and mere ethnic and racial prejudice.¹⁷⁷

While the Gallegly Amendment was ultimately dropped from federal legislation, it still hovers on the horizon as its supporters are attempting to push it through as independent legislation. Therefore, those who favor educating

to go along with the Gallegly [A]mendment") (emphasis added).

¹⁷¹ See *Plyler*, 457 U.S. at 227-30.

¹⁷² See *id.*

¹⁷³ See Hull, *supra* note 2, at 432.

¹⁷⁴ See *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (explaining the inherent importance of *stare decisis*).

¹⁷⁵ See Espenshade & Calhoun, *supra* note 13, at 189.

¹⁷⁶ See *id.* at 195.

¹⁷⁷ See *id.*

these illegal immigrant children cannot rest on their laurels. There is a need to show the rest of America that rather than viewing illegal immigrants as the source of our economic problems or as a dispensable political tool, American citizens would benefit from learning the facts and exploring the real issues surrounding illegal immigrant children. The Gallegly Amendment is not only a disservice to illegal immigrants, but also to the American public. The American public must not forget what the *Plyler* Court undoubtedly remembered: the children.